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January 9, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, D.C. 20554

Re: Docket 02-361, 03-45 Ex Parte Letter on AT&T IP

Dear Ms. Dortch:

Consistent with its current rules, the Commission must deny AT&T's Petition seeking exemption from access charges for phone-to-phone calls that are converted to Internet Protocol ("IP") during some point in the transmission. AT&T's Petition does not present any novel question of law or fact and, accordingly, should be dealt with independently and outside of the discussion on voice over IP ("VoIP").

The communication described in AT&T's petition represents nothing more than a generic phone-to-phone voice call using IP technology for some (even de minimis) part of the transmission path. From the end user's perspective - and, indeed, from the LEC's perspective - such calls are indistinguishable from regular circuit-switched long distance calls. The end-user makes these calls using traditional phone sets and no special equipment is needed at the customer's premises. AT&T's petition describes nothing more than a conversion to a different protocol-and then back again-that is completely internal to the IXC's network. Thus, phone-to-phone telephony using internet protocol for some portion of the transmission does not fall within the definition of an enhanced or information service, and, consequently, is not subject to the enhanced service access exemption. Nor is there any sound policy basis for the Commission to create a new access exemption for phone-to-phone telephony that uses IP as one of the transmission mediums. As the Commission noted in its *Report to Congress*, [1] phone-to-phone telephony that uses IP as one of the transmission mediums constitutes the provision of telecommunications service over the public switched telephone network ("PSTN") and therefore should be subject to the same access charges. Nothing in the Commission's NPRM on VoIP should change that finding because the service described in AT&T's petition is not a VoIP service but instead merely the use of internet protocol to transport a traditional telecommunications service.

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[1] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Report to Congress*, 13 FCC Rcd 11501 (1998) (*"Report to Congress"*).

consistent with current rules and will not impact any future rules the Commission may contemplate in the provision of VoIP services.

As many parties, including BellSouth, have pointed out, the key question that must be decided under the *existing regulatory paradigm* when determining what regulations apply to a service is whether the service is an information service or a telecommunications service. As the Commission discussed in its *Report to Congress*, there is a range of services, within an easily identifiable set of bookends, that may require further analysis by the Commission. The Commission has wisely decided to establish a Notice of Proposed Rulemaking ("NPRM") to address the services in the middle of range; however, the bookends need no further analysis. Representing one bookend as the outer edge of what is clearly an information service is computer-to-computer Internet communications (such as pulver.com) that never touches the public switched telephone network (PTSN). The other bookend, which represents the clearest example of a telecommunications service, is phone-to-phone IP telephony such as described in AT&T's petition. As discussed more fully below, the Commission's current rules clearly require access charges to apply to these latter calls.

To the extent that AT&T's petition can be read as bringing phone-to-phone IP within the scope of the existing enhanced services exemption, such argument has no merit. In the *Report to Congress*, the Commission stated that phone-to-phone IP telephony "closely resemble[s] traditional basic transmission offerings."[2] The Commission found that "the provider [of the service] does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[3] The Commission went on to state that "[f]rom a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files. Routing and protocol conversion within the network does not change this conclusion, because from the user's standpoint there is no change in form or content."[4]

As the Commission observed, the conversion of the voice signal into packet format and then re-conversion back to a voice signal, analog or unpacketized digital, does not change the content of the voice transmission. Indeed, such a conversion is no different than an analog signal being converted to digital, and then converted back to analog on the receiving end of a call. This, of course, is common and occurs on the majority of access calls over the PSTN. For these reasons, the Commission expressly declined to classify the service as an information service stating, "[t]he record currently before us suggests that this type of IP telephony lacks the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.'"[5] Because, as the Commission found in the *Report to Congress* that phone-to-phone telephony using IP transmission facilities is a

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[2] *Report to Congress*, 13 FCC Rcd at 11541, ¶ 83.
[3] *Id.* at 11544, ¶ 89.
[4] *Id.* ¶ 89 & n.188.
[5] *Id.*

telecommunications service, then access charges must apply pursuant to the Commission's long established rules.[6]

AT&T's attempt to broaden the exemption to include any service that at some point in the transmission will touch the Internet is insupportable.[7] It is important to note that, notwithstanding its efforts to cloak its request in the aura of the "Internet," AT&T's Petition is not limited to services that touch the Internet (with a capital "I"), but is primarily focused on traffic that runs across its traditional backbone facilities. The Commission has made clear that enhanced services and telecommunications services are mutually exclusive, and -as acknowledged by AT&T-the service described in its petition is the latter. The fact that AT&T converts this traffic to internet protocol for some portion of the transport does not change this analysis. Indeed, under AT&T's theory, carriers could simply convert some piece of every service they provide into IP technology and transmit it over the Internet and avoid access charges with impunity. This policy would not only abate the Commission's rules regarding intercarrier compensation outside the intercarrier compensation docket currently underway, but would dramatically alter universal service funding and the LECs' ability to receive compensation for the use of their networks. Such compensation is vital for the deployment and maintenance of the network.

AT&T's attempt to rely upon the *Report to Congress* as creating a new access charge exemption for phone-to-phone IP telephony is equally specious. AT&T's argument amounts to an end-run of the Administrative Procedures Act ("APA") by hinging the entirety of its argument on a single sentence in paragraph 91 of the *Report to Congress* where the Commission said "it may find it reasonable" that phone-to-phone IP telephony providers pay access charges. Read in context (rather than a single phrase in 112 page document) it is patently clear that the Commission intended no such thing. The Commission merely discusses the classification of various types of communications in response to a Congressional inquiry (again, finding phone-to-phone IP to be a telecommunications service) and specifically passes to "upcoming proceedings" whether there might be policy reasons to create a different set of regulatory requirements for specific forms of IP telephony.[8] As the *Report* notes, a laundry-list of regulatory obligations are impacted by the classification of this traffic, including "contribution to universal service, paying interstate access charges and filing interstate tariffs." But the Commission explicitly put off to these "upcoming proceedings" any changes to the existing regulatory scheme. Indeed, any reading of the *Report* even conceivably consistent with AT&T's argument would have to apply equally to the entire gamut of regulations identified in paragraph 91-including payment of universal service.[9]

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[6] *See* 47 C.F.R. § 69.5.

[7] AT&T Petition at 24-25.

[8] *See* Report to Congress at para.91.

[9] As the Commission goes on to discuss in the following paragraph, "to the extent we conclude that certain forms of phone-to-phone IP telephony are interstate 'telecommunications'," the providers of such services could be subject to contributing to the universal service fund. This contingent language is almost identical to that upon which AT&T's entire argument hinges.

Nor does the Report to Congress satisfy the procedural obligations of the APA-let alone do so in a way that anyone reasonably would rely upon as having created a fundamental change in the Commission's rules. In order for the Commission to change the application of its access charge rules, it must do so through a rulemaking proceeding pursuant to the APA.[10] Under the APA, the Commission must provide adequate public notice of a rulemaking proceeding.[11] The notice from which the Commission issued the *Report to Congress* was issued from the Universal Service proceeding and was not issued as a rulemaking - much less a rulemaking on access charges. Instead, it was a notice seeking comments on the Commission's statutory requirement to provide a report to Congress on universal service.[12] Even if the Commission wrongly considered the notice to meet the rulemaking notice requirement, the notice was completely inadequate to meet the statutory requirement of the APA. The notice stated that the Commission was following its legislative mandate to review the implementation of the provisions of the Telecommunications Act of 1996 relating to universal service and stated only that the report would "provide a detailed description of the extent to which the Commission's interpretations [of various areas related to universal service were] consistent with the plain language of the Communications Act of 1934."[13] The notice did not indicate that it was seeking comment on changes or possible exemptions to the application of access charges. And, changing the access charge rules would not be a logical outgrowth from the notice. Moreover, as SBC points out in its recent letter, the Commission's action after it issued the *Report to Congress* - the *Report* did not have an ordering clause and the Commission did not publish a summary of the *Report* in the Federal register - "underscores" that the Commission itself did not consider the *Report* to be creating new law.[14] These facts legally invalidate any claim of AT&T that the *Report to Congress* established new rules related to access charges.[15] AT&T's reliance on the *Report to Congress* as creating new rules applicable to access charges is completely baseless.

Indeed, until recently, no one in the telecommunications industry (with the possible exception of AT&T) seriously questioned the fact that this traffic was - and always has been - subject to access charges. Pursuant to the Commission's rules, BellSouth, and many other common carriers, has applied and collected access charges for these services, including the services provided by AT&T. The application of these charges was to interexchange carriers who knowingly paid the charges.[16] Those who urge the Commission now to change the rules such that access charges should not have applied in the past would subject BellSouth to substantial refunds because it followed the

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[10] *See* 5 U.S.C. §§ 551-559. See also, *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989) (an agency is prohibited from fashioning new rulemaking procedures that curtail the APA).

[11] 5 U.S.C. § 553(b).

[12] *See Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, CC Docket No. 96-45 (Report to Congress), *Public Notice*, DA 98-2 (Jan. 5, 1998).

[13] *Id.*

[14] Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, at 1 (Dec. 9, 2003) ("*SBC Letter*").

[15] SBC likewise demonstrated the legal indefensibility of AT&T's claim of reliance on the *Report to Congress* as a basis for the Commission to apply the access charge rules on a prospective-only basis. The D.C. Circuit's precedent is clear that such reliance would not allow AT&T to prevail under judicial review. *See SBC Letter* citing *Verizon v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001).

[16] *See, e.g.*, Neil Weinberg, *Screaming Match*, Forbes, Oct. 13, 2003, at 62, 64.

subject BellSouth to substantial refunds because it followed the only reasonable interpretation of the Commission's rules. Besides being patently unfair, this result clearly could not withstand judicial review.

The Commission's current rules and policies could not be clearer - phone-to-phone IP telephony is a traditional telecommunication service that uses a new technology for transmission. Accordingly, the Commission should deny AT&T's Petition and clarify that phone-to-phone IP telephony is a telecommunications service and that the *Report to Congress* did not establish an exemption for access charges for such a service. That would provide clarity to AT&T as well as to other carriers, that access charges (both interstate and intrastate) continue to apply to these telecommunications services. A swift decision by the Commission denying AT&T's Petition is needed to solve this matter and remove any confusion that AT&T has tried to cause throughout the entire industry. The Commission must move promptly to address this issue or a problem that is relatively small today will quickly mushroom into a significant problem by the end of 2004.

Sincerely,

Glenn T. Reynolds

cc:

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